

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Application of SBC Communications, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 )  
To Provide In-Region, InterLATA Services )  
in Missouri )

CC Docket No. 01-88 /

COMMENTS OF NUVOX, INC.

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## SUMMARY

NuVox submits these comments in opposition to SBC's Missouri Section 271 Application because SBC has failed to satisfy the Competitive Checklist in Missouri on two critical counts.

As explained herein, **SBC fails to provide a number of critical UNEs at prices based on TELRIC, as required under Checklist Item 2.** The "M2A" include rates for DS3 and DS1 entrance facilities, multiplexing, digital cross connect systems and SS7 cross connects and other critical UNEs that are patently excessive, not based on TELRIC, and have been allowed to be offered at non-cost-based "interim" rates for an unreasonably long period of time. For example, monthly recurring charges for DS1 entrance facilities are more than two times the rate for the same facility made available by SBC in its Texas T2A. Nonrecurring charges for the same facility are six to thirteen times higher in the M2A than they are in the T2A. Moreover, *SWBT steadfastly has refused to use its T2A rates as interim rates in Missouri, pending the adoption of permanent cost-based rates.*

Instead, SBC chooses to rely on a significant number of rates for critical UNEs established by the Missouri PSC ("Mo PSC") in an arbitration proceeding without any on-the-merits determination that the rates proposed by SBC are based on TELRIC or any reasonably related costing methodology. *The Mo PSC has opened a docket to establish permanent rates, but the current state of affairs in Missouri is that SBC does not make a number of critical UNEs available at cost-based rates – and it hasn't for more than five years.*

Promises of future performance should not suffice. Competition has been stymied in Missouri by UNE prices that are up to thirteen times higher than UNE prices offered by SBC in its Texas T2A. Moreover, SBC has anticompetitively kept its competitors' costs high by

refusing to import – at least as an interim measure – the Texas rates which the FCC already has found to be compliant with the checklist standard.

**SBC also fails to provide unbundled access to high capacity loops on a reliable and nondiscriminatory basis, as required under Checklist Item 4.** As demonstrated herein, SBC's on time performance record for delivering DS1 loops in St. Louis and Kansas City has been persistently poor. For example, SBC's own data show that it consistently misses the due date for DS1 UNE loop delivery in the range of 30-55 percent each month in St. Louis. Moreover, SBC's own data also demonstrates that it consistently provides a higher percentage (often substantially higher) of DS1 circuits on time to its own retail operations. *Thus, SBC's provisioning of unbundled access to UNE loops is not only poor, it is discriminatory.* SBC's discriminatory provisioning of UNE loops results in failures that consumers can see – and often unfairly attribute to competitors such as NuVox. Until SBC adopts a remedial plan to address this problem and can demonstrate the successful implementation of such a plan, it must not be rewarded with interLATA authority in Missouri.

In sum, NuVox respectfully urges the Commission to deny SBC's Application. SBC should not be allowed to move forward into the interLATA market until it meets its *legal obligation* to make available to competitors UNEs at cost-based rates and on a nondiscriminatory basis.

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in Missouri	)	

**COMMENTS OF NUVOX, INC.**

NuVox, Inc.<sup>1</sup> ("NuVox"), by and through its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.<sup>2</sup> The *Public Notice* invites interested parties to comment on the Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Company ("SBC" or "SWBT") to provide in-region interLATA services in the State of Missouri, pursuant to Section 271 of the Communications Act of 1934 , as amended.<sup>3</sup>

NuVox is a facilities-based integrated communications provider and competitive local exchange carrier with operations in 27 markets in 13 states throughout the Southeast and Midwest. NuVox offers a wide range of voice, data, internet and internet-related services primarily to small and medium-sized business customers. NuVox provides its own dial-tone to

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<sup>1</sup> NuVox was formerly known as Gabriel Communications, Inc. NuVox operates in Missouri through its wholly-owned subsidiary, NuVox Communications of Missouri, Inc.

<sup>2</sup> *Public Notice*, Comments Requested on the Application by SBC Communications Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Missouri, CC Docket No. 01-88 (April 4, 2001).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* U.S.C. § 151 *et seq.* ("the Act").

most of its customer base from digital switches deployed throughout its operating region.

NuVox has made a substantial investment in collocations in incumbent LEC central offices, but is dependent upon incumbent LEC loop and transport facilities to connect customers to its switching platform.

**I. SBC'S APPLICATION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH CERTAIN ITEMS OF THE "COMPETITIVE CHECKLIST"**

**A. General Legal Standard**

Section 271 of the Act<sup>4</sup> requires a showing that the Applicant is providing and has fully implemented each item of the Competitive Checklist.<sup>5</sup> To satisfy the requirement that it "is providing" each item of the Checklist, the Applicant must demonstrate not only that it is under a "concrete and specific legal obligation" to furnish the item (*e.g.*, pursuant to one or more interconnection agreements), but also must demonstrate that it "is presently ready to furnish each item in the quantities that competitors may reasonably demand and at an acceptable level of quality."<sup>6</sup> To qualify as having fully implemented the Checklist, the Applicant must show that it has satisfied each of the Checklist obligations at the time of its filing – promises of future compliance do not suffice.<sup>7</sup>

As demonstrated below, SBC's Application fails to meet this standard in several respects.

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<sup>4</sup> 47 U.S.C. § 271.

<sup>5</sup> 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), and (d)(3)(A)(i).

<sup>6</sup> Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, 13 FCC Rcd. 20543, ¶ 110 (1997) (*Ameritech Michigan Order*).

<sup>7</sup> *Id.*, ¶¶ 55, 179.

**B. Access to Unbundled Network Elements – SBC Fails to Provide A Number of Critical Unbundled Network Elements At Prices Based on Total Element Long Run Incremental Cost**

As was the case with SBC's Texas and Kansas/Oklahoma Section 271 filings, a model interconnection agreement is a key element of SBC's affirmative case regarding compliance with the items of the Competitive Checklist. The Missouri version of this model interconnection agreement is known as the "M2A". However, the M2A is deficient for purposes of Section 271 compliance due to the fact that its prices for a number of important unbundled network elements ("UNEs") are patently excessive, are not based on the total long-run incremental cost ("TELRIC") pricing methodology and have been allowed to remain in effect on an interim, non-cost basis for an unreasonably long period of time.

Some of the UNEs bearing the burden of these non-cost based rates include facilities that are particularly important to competitive carriers, including DS3 and DS1 entrance facilities, multiplexing, digital cross connect systems and SS7 cross connects. Rates for all of these (and for other) UNEs are patently excessive in comparison to SBC's Texas UNE rates.<sup>8</sup> Comparisons of M2A versus Texas rates for some of these key UNEs are provided below:

- The monthly recurring charge ("MRC") for DS3 entrance facilities is *six times higher* in the M2A than the corresponding Texas rates contained in the T2A.<sup>9</sup>

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<sup>8</sup> The Commission has encouraged states lacking extensive resources "to take advantage of the efforts devoted by New York and Texas in establishing TELRIC-compliant prices, by relying where appropriate on the existing work product of those states. *Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, FCC 01-29, CC Docket No. 00-217, n. 244 (rel. Jan. 22, 2001) (*SWBT Kansas/Oklahoma Order*). Since Texas and Missouri are both SWBT region states, Texas provides the best analogue for UNE price comparisons with Missouri.

<sup>9</sup> The M2A's MRC for DS3 entrance facilities (which is the same across all density zones) is \$1,884.49, compared to an urban zone Texas rate of \$286.29. Even the rural density zone Texas MRC is only \$458.44, or approximately 25% of the averaged M2A charge.

- Non-recurring charges (“NRCs”) for DS3 entrance facilities in the M2A are also significantly higher than Texas, notwithstanding SBC’s inclusion of the same 25% “discount” in Missouri that it ultimately added to its Kansas/Oklahoma Joint Application.<sup>10</sup>
- The MRC for DS1 entrance facilities in the M2A is *more than two times* the level for the same facility in the T2A,<sup>11</sup> while the NRCs in the M2A are *six to thirteen times* the T2A prices.<sup>12</sup>
- The MRC for Voice Grade to DS1 Multiplexing in the M2A is *more than two times* the charge in the T2A,<sup>13</sup> while the NRCs in the M2A are *two to three times higher* than the comparable Texas prices.<sup>14</sup>
- The MRC for DS1 to DS3 Multiplexing in the M2A is *more than two times* the Texas rate,<sup>15</sup> while the NRCs in the M2A are in the range of *30 to 50% higher* than the T2A charges.<sup>16</sup>
- The M2A’s Digital Cross Connect System MRCs *range from two to six times higher* than the comparable T2A rates.<sup>17</sup>
- MRCs for SS7 Link Cross Connects are *approximately 75% higher* in the M2A than in Texas,<sup>18</sup> while the NRCs are *two to three times higher* under the M2A.<sup>19</sup>

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<sup>10</sup> Even after giving effect to the 25% “discount”, these NRCs are \$477.75 (initial, per order)/\$372.00 (additional per order) in the M2A, versus \$395.59/\$175.57 in Texas.

<sup>11</sup> The M2A’s MRC for DS1 entrance facilities (same rate across all density zones) is \$162.30, while the comparable T2A MRC varies in a tight range of approximately \$75 to \$77 depending on the density zone.

<sup>12</sup> The M2A’s NRCs for DS1 entrance facilities are \$471.00 (initial, per order)/\$342 (additional, per order), while the corresponding Texas NRCs are \$73.25/\$26.28.

<sup>13</sup> The M2A MRC for VG to DS1 multiplexing is \$180.00 versus \$81.15 in Texas.

<sup>14</sup> The M2A’s NRCs are \$195.00 (initial, per order)/\$120.75 (additional, per order), versus \$96.84/\$48.51 in the T2A.

<sup>15</sup> The M2A MRC for DS1 to DS3 multiplexing is \$815.00 versus \$365.11 in Texas.

<sup>16</sup> The M2A NRCs are \$1,029.00 (initial, per order)/\$609.75 (additional, per order) versus \$777.51/\$439.79 under the T2A.

<sup>17</sup> The M2A versus T2A MRCs are: DSO DCS Port: Missouri - \$13.70, Texas - \$2.33; DS1 DCS Port: Missouri - \$45.14, Texas - \$7.33; DS3 DCS Port: Missouri - \$490.05, Texas - \$199.46.

<sup>18</sup> The MRCs are: STP to Collocation Cage – DSO: Missouri - \$74.20, Texas - \$42.58; STP to Collocation Cage DS1: Missouri - \$53.65, Texas - \$30.89.

<sup>19</sup> The NRCs are: STP to Collocation Cage – DSO: Missouri - \$224.85/\$151.84, Texas - \$67.24/64.55; STP to Collocation Cage DS1: Missouri - \$192.75/\$130.84, Texas - \$75.12/\$72.46.



Excessive rates such as these for essential UNEs artificially inflate competitive carriers' costs and impede development of a fully competitive telecommunications market.

The reason the M2A contains these excessive UNE rates is threefold:

- (a) These prices are non-cost based, were approved on an "interim basis" by the Missouri Public Service Commission ("Mo PSC") in a December, 1997 arbitration decision, and have been allowed to remain in effect on an "interim basis" since that time;<sup>20</sup> and,
- (b) SBC has steadfastly resisted the position put forward by competitive carriers that Texas prices be substituted for these UNEs on an interim basis pending Mo PSC determination of Missouri TELRIC prices; and,
- (c) The Mo PSC inexplicably refrained from requiring SBC to substitute Texas TELRIC prices on an interim basis as a condition of supporting this Application.

The Mo PSC established these UNE rates in the second round of arbitration proceedings between SWBT and AT&T in its Case No. TO-98-115.<sup>21</sup> In that decision, the Mo PSC set approximately 135 UNE prices on an interim, non-TELRIC basis, including the entrance facility, multiplexing, digital cross connect and SS7 link cross connect rates identified above, plus a number of other UNEs.<sup>22</sup> The Mo PSC gave initial indications that it intended to move relatively quickly to determine Missouri TELRIC-based prices for these UNEs,<sup>23</sup> but to date it has yet to

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<sup>20</sup> *In the Matter of AT&T Communications of the Southwest, Inc. 's Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Mo PSC Case No. TO-98-115, Report and Order, (December 23, 1997) (*TO-98-115 Decision*).

<sup>21</sup> *Id.* The UNEs for which the Mo PSC set non-cost based interim prices in this decision are hereinafter referred to as the "TO-98-115 UNEs".

<sup>22</sup> Switch-based feature activation UNEs, were set at zero on an interim basis. Since NuVox deploys its own switching platform, it makes very limited use of SBC's switching services and features.

<sup>23</sup> In its December 23, 1997 decision, the Mo PSC initially directed its Arbitration Advisory Staff to commence an investigation within two weeks – by January 5, 1998 – to establish permanent rates for the TO-98-115 UNEs, and stated an intent to conclude the investigation by July 1, 1998. *TO-98-115 Decision*, at p. 38.

render a substantive decision.<sup>24</sup> As a result, these non-cost based, anticompetitive UNE rates have been in effect for almost three and a half years.<sup>25</sup>

Checklist Item 2 requires a demonstration by the Applicant that it is providing nondiscriminatory access to network elements consistent with Sections 251(c)(3) and 252(d)(1) of the Act.<sup>26</sup> Section 251(c)(3) obligates incumbent LECs to provide non-discriminatory access to network elements on an unbundled basis at any technically feasible point and “on rates, terms and conditions that are just, reasonable and nondiscriminatory.”<sup>27</sup> In turn, Section 252(d)(1) requires that state commission determinations of rates for UNEs be based on the cost of providing the network element, be nondiscriminatory and may include a reasonable profit.<sup>28</sup> The Commission has construed this statutory mandate to require that UNE prices be set based on the total element long run incremental cost (TELRIC) of providing the network element.<sup>29</sup>

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<sup>24</sup> The Arbitration Advisory Staff filed a report regarding permanent UNE prices in June, 1998, and the Mo PSC held a hearing in September, 1998, but no decision was issued.

<sup>25</sup> More recently – coincident with its announcement of support for SBC’s Missouri 271 Application – the Mo PSC established several dockets to address unresolved issues, including permanent pricing for the TO-98-115 UNEs (Mo PSC Case No. TO-2001-438), for xDSL line conditioning (Mo PSC Case No. TO-2001-439), and for line sharing and line splitting (Case No. TO-2001-440). The Mo PSC also has in process a docket (Mo PSC Case No. TT-2001-298) which will replace SWBT’s Missouri practice of providing collocation on a completely “individual case basis”, by establishing a collocation tariff with prices based on Missouri TELRIC. The preliminary nature of each of these dockets strongly suggests that SBC’s Missouri Application is premature.

<sup>26</sup> 47 U.S.C. § 271(B)(ii).

<sup>27</sup> 47 U.S.C. § 251(c)(3).

<sup>28</sup> 47 U.S.C. § 252(d)(1).

<sup>29</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15844-46, ¶¶ 674-679; C.F.R. §§ 51.501 *et seq.* The Commission’s authority to establish these pricing rules was upheld by the United States Supreme Court in January, 1999 in *American Tel & Tel Co. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Subsequently, the United States Court of Appeals for the Eighth Circuit held that certain aspects of the Commission’s TELRIC pricing rules were contrary to Congressional intent. *Iowa Utils. Bd. v. FCC*, 69 U.S.L.W. 3269 (U.S. Oct. 4, 2000) (No.00-511). However, the Eighth Circuit has stayed the issuance of its mandate pending review by the Supreme Court and, as a result, the Commission’s TELRIC rules remain operative, including for purposes of Applications under Section 271 of the Act.

SBC may assert that the TO-98-115 UNE prices are based on TELRIC, but any such claim would merely reflect SBC's unsubstantiated belief -- SBC cannot represent to the Commission that a substantive, on-the-merits determination has been made at the state commission level that the TO-98-115 UNE prices are based on the Mo PSC's application of TELRIC or any reasonably related costing methodology. No such determination has ever been made. As a result, there is absolutely no basis for the Commission to make the required finding that these UNE rates "fall within the reasonable range of TELRIC prices."<sup>30</sup>

Nor does the M2A (or the record created at the Mo PSC<sup>31</sup>) provide a basis to support the necessary finding that the state commission's orders demonstrate a consistent application of TELRIC principles.<sup>32</sup> The Mo PSC has failed to make on-the-merits determinations of TELRIC-based prices for a large number of UNEs, including but not limited to the TO-98-115 UNE rates. While NuVox applauds the Mo PSC's recent moves to establish new investigatory dockets and move forward with establishing permanent UNE prices based on Missouri TELRIC, for purposes of this Application the determinative factor is the current pricing of SBC's Missouri UNEs. Until near the end of the state proceeding which ultimately resulted in the Mo PSC's statement in support of this Application, SBC clung to its initial position that its initially-proposed UNE rates (which it purported to be based on cost studies consistent with TELRIC principles, but which had never been substantively approved by the Mo PSC) be accepted for use in the M2A. Only when pressed by the Mo PSC late in the process did SBC agree to substitute

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<sup>30</sup> *SWBT Kansas/Oklahoma Order*, ¶ 55.

<sup>31</sup> Mo PSC Case No. TO-99-227.

<sup>32</sup> *SWBT Kansas/Oklahoma Order*, ¶ 55.

Texas TELRIC prices for a number of its Missouri rates.<sup>33</sup> However, notwithstanding the fact that the TO-98-115 UNEs prices are, for some critical facilities, *several hundred percent higher* than the prices for the same UNEs in the T2A, SBC thus far has refused to reduce those rates as a condition of obtaining in-region, interLATA services authority for Missouri. NuVox respectfully urges the Commission to provide additional guidance to SBC in this respect.

Such guidance is necessary because the Mo PSC unfortunately failed to require SBC to substitute Texas TELRIC prices for the rates SBC has included in the M2A for the TO-98-115 UNEs. The rationale offered by the Mo PSC in defense of its decision to allow continued use of the TO-98-115 prices in the M2A and to support SBC's Application on that basis is both illogical and without any basis under applicable law. In announcing its opinion that SBC meets all requirements under Section 271 of the Act, the Mo PSC found continued use of the TO-98-115 UNE prices acceptable in the M2A because these rates are contained in a number of SBC interconnection agreements with competitive carriers in Missouri and have been used by SBC and some of those carriers for a substantial period of time.<sup>34</sup> Of course, the fact that the TO-98-

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<sup>33</sup> For example, at a January 31, 2001 hearing in Mo PSC Case No. TO-99-227, SWBT agreed to include Texas collocation prices in the M2A, pending a determination of Missouri TELRIC collocation prices in Mo PSC Case No. TT-2001-298. This concession came after months of competitive carriers urging this result. *See, Interim Order Regarding the Missouri Interconnection Agreement*, Mo PSC Case No. TO-99-227 at pp. 3-4 (issued February 13, 2001) (*Mo PSC Interim 271 Order*). Likewise, SWBT agreed – late in the process and reluctantly – to use Texas xDSL loop conditioning prices on an interim basis pending the determination of Missouri TELRIC prices in the pending investigation in Mo PSC Case No. TO-2001-439. *Mo PSC Interim 271 Order*, at p. 6. SWBT also agreed to use Texas prices on an interim basis for 95 UNEs for which rates were set on a non-cost basis in the first AT&T-SWBT Missouri arbitration. *Mo PSC Interim 271 Order*, pp. 5-6. As demonstrated above, the disparity between remaining TO-98-115 UNE rates and SBC's Texas T2A rates strongly suggests that SBC should adopt the Texas rates in Missouri, at least as an interim measure pending the result of the Mo PSC's UNE pricing docket.

<sup>34</sup> *See, Mo PSC Interim 271 Order*, p. 5. The Mo PSC rejected NuVox's Application for Rehearing or, in the Alternative, Motion for Reconsideration and Modification of the Interim Order on this point without substantive discussion. *See, also, Order Denying Motions for Rehearing, Reconsideration and Clarification of Interim Order*, Mo PSC Case No. TO-99-227, at pp. 2-3 (issued March 15, 2001) (*Mo PSC Order Denying Rehearing*).

155 UNE prices are incorporated into many Missouri interconnection agreements is not surprising – because the Mo PSC sanctioned these rates in its December, 1997 decision and has yet to issue an on-the-merits decision revising them to reflect Missouri TELRIC. Until the Mo PSC completes a valid UNE pricing docket, SBC has no incentive to offer lower prices for these UNEs in Missouri (and it does not offer lower prices to requesting carriers). Likewise, the fact that some CLECs (including NuVox) have operated under these interconnection agreements merely reflects the fact that in order to offer service in Missouri these competitive carriers have been forced to accept the non-cost-based UNE prices that are available. To the extent prices for essential UNEs are excessive, they artificially inflate competitive carriers' costs of doing business. The fact that excessive UNE prices have failed to deter all competitive entry in Missouri does not establish the reasonableness of those prices, nor does it demonstrate SBC's compliance with the pricing provisions of the Act and the Commission's TELRIC pricing rules.<sup>35</sup>

Nor can SBC rely on the Commission's limited interim rate exception to justify use of the TO-98-115 UNE prices in the M2A. The Missouri situation does not present facts similar to those in the Commission's approval of Verizon's (then Bell Atlantic) New York Section 271 Application in which interim prices were sanctioned for what were then relatively new UNEs – xDSL loops – and in circumstances where the state commission had demonstrated a track record

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<sup>35</sup> In its after-the-fact *Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A)*, Mo PSC Case No. To-99-227 (issued March 15, 2001) (*Order Regarding Recommendation on 271 Application*), the Mo PSC suggests that the TO-98-115 rates are useable in the M2A because they are the product of an arbitration. However, unlike the first AT&T-SWBT Missouri arbitration (Case No. TO-97-40) – where some but not all UNE prices were set based on Missouri incremental costs and arguably consistent with TELRIC principles – the UNE prices set in December, 1997 in Case No. TO-98-115 were not based on an on-the-merits determination of TELRIC costs, notwithstanding the fact that this case was an arbitration. Regarding entrance facilities, multiplexing and other TO-98-115 UNEs noted herein, the Mo PSC merely accepted SWBT's proposed prices on an interim basis without any finding that the underlying SWBT cost

*continued ...*

of setting other prices based on TELRIC.<sup>36</sup> The Missouri situation is also unlike that presented in SBC's Texas Application, where the Commission again sanctioned limited use of interim UNE rates.<sup>37</sup> In the *SWBT Texas Order*, the Commission found interim collocation prices satisfied Section 271's pricing requirements. But in those circumstances the Texas PUC had set the interim prices based on TELRIC principles, and did so in the context of having consistently pursued TELRIC pricing for Texas UNEs and interconnection.<sup>38</sup>

In Missouri, the facts are materially different: As noted above, the TO-98-115 UNE rates were set by the Mo PSC nearly three and a half years ago; this is not a matter of a state commission dealing contemporaneously with relatively new UNEs and setting interim prices temporarily until it can "sync-up" its cost investigation and the determination of permanent TELRIC prices with a newly presented set of additional UNEs. There is no factual record to support a finding that the TO-98-115 UNE prices are set based on TELRIC principles. As noted above, the Mo PSC is now moving forward to establish a fresh factual record and to make on-the-merits pricing determinations for all UNEs which have previously been set on a basis other than Missouri TELRIC, including the TO-98-115 UNEs. NuVox is participating in those Missouri dockets and fully supports the Mo PSC's efforts to resolve these pricing issues. But those current efforts, and the prospect of Missouri TELRIC-based prices for these UNEs

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studies were consistent with TELRIC – Missouri TELRIC-based prices were to be determined in the follow-up case which was never decided. See, *TO-98-115 Decision*, pp. 21-22 (Issues 1b, 1c, 1j, and 7).

<sup>36</sup> *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4091, ¶ 259 (*Bell Atlantic New York Order*).

<sup>37</sup> *Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶¶ 82-90 (*SWBT Texas Order*).

<sup>38</sup> *Id.*

sometime in the future, does not cure the Checklist Item 2 deficiency caused by SBC's insistence on relying on non-cost based rates for a current Section 271 Application for Missouri.

The remedy for this Checklist Item 2 deficiency is straightforward; it is the remedy that NuVox consistently advocated during the state commission proceedings:<sup>39</sup> the Commission should require SBC to substitute its T2A prices for those it has proposed in the M2A for the TO-98-115 UNEs. This substitution would apply on an interim basis until such time as the Mo PSC makes an on-the-merits determination of Missouri TELRIC prices for these UNEs in its current investigation. When SBC submits a revised Application that substitutes these Texas prices in the M2A, this Checklist Item 2 deficiency will be cured.

**C. SBC's Poor High Capacity Loop Provisioning Casts Serious Doubt On Its Compliance With Checklist Item 4**

To meet its obligations under Checklist Item 4, an Applicant must show that it is providing "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."<sup>40</sup> The Applicant must demonstrate that it has a concrete and specific legal obligation to furnish loops, and that it is doing so in the quantities competitors demand and at an acceptable level of quality, and on a nondiscriminatory basis.<sup>41</sup> Access must be provided to any functionality of the loop which is requested by a competing carrier unless it is not technically feasible to condition the loop to support the functionality requested.

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<sup>39</sup> During the course of the state proceedings, NuVox's position has been that Texas prices should be used in the M2A on an interim basis for all UNEs for which the Mo PSC has yet to make on-the-merits determinations based on Missouri TELRIC.

<sup>40</sup> 47 U.S.C. § 271(c)(2)(B)(iv).

<sup>41</sup> *SWBT Texas Order*, 15 FCC Rcd at 18481, ¶ 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, ¶ 269.

SBC's on time performance in delivering DS1 loops has been persistently poor in Missouri, particularly in the largest market area in the state – St. Louis.<sup>42</sup> Based on SBC's own data and for all CLECs, it consistently misses the due date for DS1 UNE loop delivery in the range of 30-55% each month in St. Louis. The miss rate has not dropped below 30% in St. Louis since May, 2000 – *i.e.*, nine consecutive months from June 2000 through February 2001, the last month for which data is available.<sup>43</sup> NuVox's own experience has been very similar to that experienced by CLECs in the aggregate. In Kansas City, the state's second largest market, SBC's data indicates improvement over the last three months of reported data (December 2000 through February 2001). Prior to December, the Kansas City performance approached the St. Louis experience – from June through November, 2000, SWBT's Percent Caused Missed due dates for all CLECs never dropped below 22.7% and reached a high of 48.5% in August.<sup>44</sup>

Moreover, in the St. Louis market, SBC consistently provides a higher percentage (and often a substantially higher percentage) of DS1 circuits on time for its own retail operations. In the nine month period June 2000 through February 2001, *SBC provided its own retail customers better on time performance of DS1 loop delivery in eight of those nine months.*<sup>45</sup> Frequently, the differential favored SBC's customers by 15% or more.<sup>46</sup> On its face, this data should raise

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<sup>42</sup> This item is covered in Measure No. 58-06 of SBC's Performance Measure Tracking reports – "Percent SWBT Caused Missed Due Dates".

<sup>43</sup> SWBT Performance Measurement Tracking Report, February 2001.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> For Kansas City, the results again are better but still mixed – for the seven of those months where data is available for comparison, SBC delivered better performance to its own retail customers in three of those months. *Id.*



serious doubt as to whether SBC is meeting its obligation to provide reasonable and nondiscriminatory access to unbundled loops.

SBC's failure to provide reasonable and parity performance in the on time delivery of DS1 loops is not a mere technical or academic failure – it has a significant, detrimental effect on competitors and, therefore, on the development of a competitive market for local exchange and broadband services in Missouri. For NuVox, as for a number of other CLECs, DS1 level service is at the core of its business plan. NuVox uses DS1 UNE loops to connect customers to its switching platforms to provide customers a combination of voice and broadband data/internet services. High capacity loops, combined with dedicated transport, offer a viable and, in many cases, a superior alternative for providing small and medium-size business customers with broadband access for their voice and data needs. Because of the incumbent LECs' historic dominant market position and the resulting brand recognition advantage that comes with it, new entrants like NuVox are disadvantaged disproportionately when they cannot deliver high capacity loops in a timely manner – particularly when SBC consistently provides its own customers better on time delivery. In any particular instance, a sale may not be lost due to this discriminatory differential; instead, the damage is more insidious – a general but unjustified perception develops in the marketplace that CLECs are not as competent as the incumbent LEC in providing service in a timely manner.

SBC may report to the Commission that it is working with NuVox to improve performance. Such an assertion would be true in a sense – NuVox insists on regular (at least bi-weekly) conference calls or meetings to address service-related issues of various kinds across all

of NuVox's SBC markets,<sup>47</sup> and trouble-shooting regarding installations of specific facilities occur essentially on a daily basis. However, it has been NuVox's general experience that SBC approaches service issues mainly in a reactive mode, responding to NuVox escalations of issues with delivery or performance of particular circuits. To date, however, SBC has failed to provide NuVox with a candid analysis of the underlying cause of this persistent failure to deliver DS1 circuits on time. On several occasions, including once in writing, NuVox has – with specific reference to the issue of on time delivery of DS1 loops in Missouri – requested SBC to: (a) identify the reason why it consistently fails to deliver DS1 loops on time; (b) identify a remedial plan reasonably calculated to cure the problem; and (c) confirm the remedial plan is effective through demonstrated improvement.<sup>48</sup> To date, NuVox has yet to receive a response to these requests.<sup>49</sup> One is left to speculate as to the reason for this performance deficiency: Reluctance

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<sup>47</sup> In addition to Missouri, NuVox has one or more markets in three other SWBT region states (Arkansas, Kansas, and Oklahoma) and in three Ameritech region states (Illinois, Indiana and Ohio). The NuVox-SBC service issues conference calls and meetings cover all markets, except to the extent that issues unique or exceptional to any particular market or markets may be the focus of a particular meeting.

<sup>48</sup> The written request was made on December 11, 2000 by electronic mail message to NuVox's SBC Account Team. The written request was renewed verbally by NuVox on March 2, 2001, at the Vice Present level, which elicited a March 7 commitment that a written response would be forthcoming. To NuVox's knowledge, SBC has never supplied that written response.

<sup>49</sup> NuVox has also pursued this issue throughout the state commission proceedings. The Mo PSC, however, failed to address the issue in any substantive manner. *See, Mo PSC Interim 271 Order* (No discussion of the issue); *see, also, Mo PSC Order Denying Rehearing*, (no substantive discussion, but Mo PSC states it has considered all issues in making its recommendation in support of SWBT's Missouri Section 271 status); *see, also, Order Regarding Recommendation on 271 Application*, pp. 44-45 (Mo PSC finding, among other things, that SWBT had shown recent improvement in DS1 loop delivery in the Kansas City market, and that SWBT "has adequately addressed its failure to achieve parity in every instance", citing SWBT witness Dysart's post-November hearing affidavit. However, the Dysart affidavit fails to address SBC's own data and the high missed due date percentages and discriminatory differentials demonstrated in that data.

to commit the necessary capital? Insufficient workforce? Effect of cannibalizing resources to address service problems in other states?<sup>50</sup>

While the Commission has previously refrained from finding SBC's poor on time performance in delivering DS1 loops to constitute a bar to approval under Section 271,<sup>51</sup> a similar finding is inappropriate here. In Missouri, SBC's data demonstrates that its performance is not only poor but also is *discriminatory*. Moreover, one might think given the "warning flags" raised on this issue in its Kansas/Oklahoma Joint Application, SBC would have taken steps to materially improve its Missouri performance before pursuing this Application, but SBC has failed – particularly in the St. Louis market – to take the necessary steps to resolve the issue. These facts do not support a finding that SBC is currently compliant with Checklist Item 4. Before the Commission finds compliance with this Checklist Item, it should require SBC to provide a remedial plan, show material improvement in its delivery of DS1 loops, and to refile its Application when it can make that showing.

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<sup>50</sup> Based on its experience in Ohio, Indiana and Illinois, NuVox encounters similar and even more pervasive DS1 provisioning problems in SBC's Ameritech region.

<sup>51</sup> *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, FCC 01-29, CC Docket No. 00-217, ¶ 213 (rel. January 22, 2001) (*SWBT Kansas/Oklahoma Order*).

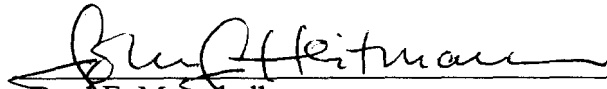
**CONCLUSION**

SBC's Application for Section 271 authorization for Missouri should be denied at this time for the reasons explained above. SBC should be directed to substitute Texas prices for the Missouri TO-98-115 UNE prices on an interim basis to cure the Checklist Item 2 deficiency, and should be required to identify and implement a remedial plan to cure its Checklist Item 4 deficiency.

Respectfully submitted,

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